

September 22, 2010

Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: MM Docket No. 99-25 (LPFM Proceeding)

Dear Ms Dortch:

On July 8, 2010, Educational Media Foundation ("EMF") and Prometheus Radio Project ("Prometheus") filed a Memorandum of Agreement in the above-referenced proceeding, proposing a resolution to issues concerning the disposition of FM translator applications pending from the 2003 Translator Window, and otherwise addressing points previously debated by translator and LPFM advocates. After a number of meetings at the FCC and discussions with various concerned parties, Prometheus and EMF have revised their proposal to attempt to address some of the issues that have been raised about the July 8 proposal. A revised proposal is attached hereto.

Should there be any questions concerning this revised proposal, please contact the undersigned, counsel to EMF, or Matt Wood at Media Access Project, counsel to Prometheus.

Sincerely,


David Oxenford

Enclosure

Memorandum of Agreement Regarding LPFM/FM Translator Priorities

The undersigned parties, active participants before the Federal Communications Commission in connection with the issues raised by MM Docket 99-25 regarding the priorities between FM translators and LPFM stations, hereby submit this Memorandum concerning the understandings that they have reached as to (i) the disposition of the pending FM translator applications submitted during the 2003 FM Translator Window, (ii) other issues raised in Docket 99-25, and (iii) other issues which would otherwise help to establish the priorities between Low Power FM stations and FM translators in the future and to establish a working relationship between the parties to this agreement and other similarly situated parties.

I. 2003 FM Translator Window

1) As to the pending applications for FM translators filed during the 2003 FM Translator Window, the parties recognize that, for purposes of this agreement, a limit of 10 protected FM translator applications from that window may not serve the interests of either the FM translator or the LPFM communities. A limit of 10 protected FM translator applications identified before an LPFM window may result in the preclusion of many new LPFM stations in larger markets through the grants of new FM translator applications, while also resulting in rural populations and other underserved areas not receiving any radio service because FM translator applicants forego protection of these applications when selecting the 10 applications to prosecute. The parties further recognize that there have been objections to the original version of this Memorandum of Agreement, as it could preclude some small broadcast groups from receiving any grants of their long-pending applications were an LPFM window to be held before the processing of any additional applications from the 2003 Translator Window. The parties revise their original proposal to suggest that some such opportunity be given to those FM translator applicants before the LPFM window suggested below be opened. To minimize its impact on the availability of LPFM channels, Prometheus proposes that this window be opened as follows: For those applicants who have had no translator applications granted from among the applications filed by that applicant in the 2003 Translator Window, such filers should be accorded the opportunity to provide an engineering solution that would allow one of their pending applications to be granted prior to the LPFM window proposed herein.

2) The Commission should keep all other FM translator applications from the 2003 FM Translator Window not disposed of pursuant to paragraph 1 above on file, but continue to defer the processing of all of these applications until after the LPFM window described below.

3) After the limited settlement window set out in paragraph 1 above, the Commission should open an LPFM window allowing for the filing of applications for new LPFM stations nationwide. Applications filed in this window would receive a preference over applications that remain pending from the 2003 Translator Window.

4) Once the Commission has identified applications from the LPFM window that would preclude the grant of any remaining applications from the 2003 FM Translator Window, the Commission should resume processing all of the remaining FM translator applications not precluded by an LPFM application. At that point the Commission should open a settlement window for the remaining 2003 applications, thereafter grant applications that can be granted following the settlement window, and use the established selection process to resolve all of the remaining pending FM translator applications.

5) To reduce or eliminate speculation in FM translators granted pursuant to paragraphs 1 or 4 above, the Commission could adopt rules limiting the sale of construction permits or subsequently constructed FM translators, providing in those rules that:

- a. No sale of a construction permit or constructed FM translator will be permitted except for reimbursement of reasonable, documented costs of prosecution of the application and construction of the FM translator, or as part of a sale that includes the sale of the FM translator's primary station.
- b. The transfer restrictions specified in subparagraph (a) above would terminate two years after the date on which the FM translator was constructed and placed into operation.

As set forth in the attached Memorandum of Law, the proposals set out above can be adopted without the need for a further Notice of Proposed Rulemaking or without otherwise requiring any Notice and Comment process, as the result is a logical outgrowth of the questions asked in the Notice of Proposed Rulemaking in MM Docket 99-25. Just as the cap of 10 was adopted without being specifically proposed in the NPRM, the caps proposed above and the deferral of all FM translator applications until after the LPFM window can be adopted without any further notice.

II. Other Issues

The parties also urge the Commission to look at other issues in the future to firmly establish the priorities between LPFM and FM translators. Some of the following proposals can be resolved in the context of the existing MM Docket 99-25 Further Notice of Proposed Rulemaking, while other proposals may need further notice and comment. However, to be clear, the following proposals *need not be resolved by the Commission at the same time as the proposals set out above*, but may be resolved after additional consideration and comment. The parties' suggestions for future Commission consideration are as follows:

- 1) The parties agree that LPFM stations should not be given any priority over existing FM translators and granted construction permits for FM translators. The investments made in FM translators and the existing listening habits of the audience of FM translators should not be disturbed.
- 2) The Commission should recognize that, in future proceedings, LPFM applicants providing a local service should be given a preference over distant FM translator

applicants. The parties urge the Commission to adopt an application process that would include the following elements:

- A. Regular filing windows for both LPFM stations and FM translators.
- B. Unified windows in which both LPFM applications and those for FM translators can be filed, with LPFM applicants being allowed to file using FM translator contour protection standards, but subject to FM translator interference remediation requirements as set forth in Part 74 of the FCC rules.
- C. A priority system that would favor FM translators and LPFM stations providing local service over remote FM translators. The priorities between LPFM stations, FM translators providing fill-in service for AM stations, and other FM translators can be decided in the proceeding establishing procedures for the unified LPFM/translator windows, but such priorities should prefer local applicants over distant translators. While Prometheus wishes to make clear that it believes that LPFM applicants should be preferred over all FM translator applicants in any unified window, the parties recognize that there will be other affected parties who may dispute this position, and leave this question to resolution in a future proceeding. This question need not be resolved until after the disposition of the 2003 FM Translator Window applications and the exclusive LPFM window suggested above.
- D. A limitation on the number of FM translator applications that could be filed in any window by any applicant. The Commission could consider a number of options in establishing a limit, which need not be based on a hard and fast nationwide limitation such as a cap of 10 applications nationwide. For example, the Commission could instead consider:
 - i. A market cap of one application per window per applicant.
 - ii. A national cap of twenty-five applications per applicant in the top 150 markets and another twenty-five applications for markets 151-302.
 - iii. For FM translators that cover 20,000 or fewer persons within their 60 dBu coverage area, a separate higher national limit of perhaps 50 or 100 applications per applicant in such areas.
- E. To limit speculation in future windows, the Commission could adopt a rule requiring that, for a two-year period from the date of the commencement of operations of any FM translator, the FM translator would be required to carry the primary station proposed in the original application filed by the translator applicant in that window. While this rule could be imposed on the remaining applications in the 2003 FM Translator Window, given the length of time that has elapsed since the filing of these applications, EMF acknowledges the concern that such a retrospective rule might work an unusual hardship on many applicants given changes in proposed primary stations and business plans that may have occurred during the period that these applications have been on file.

Other viable options should also be considered. Any limit that the Commission ultimately adopts should allow FM translators to serve the needs of broadcasters and listeners in rural as well as more urban areas without flooding the Commission's processing channels. Note that the numbers provided here are for illustration purposes only, and do not necessarily reflect limits to which the parties would agree – but the parties are agreed on the concept of exploring market-based limits as opposed to options based solely on national limits, if tied in with a unified LPFM/translator window as described above.

3) Allowing LPFM stations to operate on 87.5, 87.7, and 87.9 on the basis that they do not interfere with existing television, Low Power Television or FM radio services.

4) The exploration of allowing FM translators to be converted to LPFM uses (such uses to be subject to all limitations on LPFM operations) if a local group can reach an agreement with an FM translator licensee for the sale or donation of the FM translator.

5) The parties agree that new LPFM applications, while having a priority over applications for new distant FM translators in any subsequent unified window, will not have any priority or other ability to preempt existing or authorized FM translators.

PROMETHEUS RADIO PROJECT

EDUCATIONAL MEDIA FOUNDATION

/s/ Pete Tridish

/s/ Mike Novak

Memorandum of Law

In the accompanying Memorandum of Agreement, the parties have urged the Commission to abandon its 2007 decision to limit FM translator applicants from the 2003 FM translator window to pursuing 10 applications, and dismissing all others. Instead, the parties urge the FCC to hold all of the applications in abeyance, and open a LPFM filing window. After the LPFM window, the parties request that the FCC process all of the remaining translator applications. As set forth in detail herein, the Commission can adopt an order effectuating the foregoing proposal without first issuing a public notice or otherwise seeking comment on it, as such an order clearly would be a "logical outgrowth" of the rulemaking given the history of this docket. See, e.g., *Crawford v. FCC*, 417 F.3d 1289, 1295-97 (D.C. Cir. 2005); accord, *Covad Communications Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006). As long as the conclusion reached by the Commission is a logical outgrowth of a rulemaking proposal on which the public has had the opportunity to comment, a further notice of proposed rulemaking is not necessary. This proposal clearly is such a logical outgrowth of the 2005 Further Notice of Proposed Rulemaking, which led to the order setting the requirement for the selection of 10 translator applications to pursue, a requirement that is currently subject to pending petitions for reconsideration and which has been suspended.

In establishing the LPFM service, the Commission initially decided to have "new LPFM stations protect ... the existing services of FM translator and booster stations," and "FM translator ... facilities proposed in applications ... filed before a public notice announcing an LPFM application filing window." 15 FCC Rcd. 2205 ¶¶ 62-63 (2000) ("*LPFM R&O*"). But the *LPFM R&O* was far from the end of the matter, as in response to petitions for reconsideration and other input, LPFM rules were readjusted/clarified, including those pertinent to the interrelationship of LPFM and translator stations. 15 FCC Rcd. 19208 (2000) ("*LPFM MO&O/Recon. Order*"). This included observations about separations requirements and the protection LPFMs and translators must afford one another, rejection of proposals to make LPFM stations secondary to translators and, significantly for present purposes, invitation of "suggested improvements in these areas." *Id.* ¶¶ 37-41. See also *id.* ¶ 30.

The Commission's call for "suggested improvements" lead to a Further Notice of Proposed Rulemaking in the docket to, among many other things, "reevaluate the co-equal status of LPFM and FM translator stations." 20 FCC Rcd. 6763 ¶ 31 (2005) ("*Second Recon. Order/FNPRM*"). Significantly, the Commission undertook such reevaluation not just as a general matter, but "as a result of ... FM translator construction permit applications" filed in Auction 83. *Id.* This discussion clearly indicated new accommodations between translators and LPFMs would have to be made, see generally *id.* ¶¶ 30-36, and sought comment about the appropriate contours of such measures. This notably included prospects of requiring "dismiss[al] of] all pending applications for new FM translator stations and mak[ing] potential refilings subject to resolution of the [] issues raised in this proceeding." ¶ 33. At this point, if not before, it should have been clear to all interested parties that something may be afoot not only vis-à-vis future LPFM and translator opportunities, but also for the fate of the then-pending Auction 83 translator proposals. At this point, the public was invited to comment on the Commission's proposals about the LPFM-translator relationship, and about what to do about the FM translator applications filed in Auction 83.

Accordingly, the Commission's inquiry in the *Second Recon. Order/FNPRM* led to further examination of "altering the priorities" between the LPFM and FM translator services, and in the interim, limited further processing of applications filed in Auction 83 to ten applications per applicant. 22 FCC Rcd. 21912, ¶¶ 50-57, 84 (2007) ("*Third R&O/Second FNPRM*"). There can be no doubt the prospect of LPFMs and translators being put on equal footing with one another going forward, and giving prospective LPFM applicants "first crack" in ensuing filing windows, has been framed as a possible and logical decision based on the *Third R&O/Second FNPRM*. The limit of ten applications per applicant was adopted by the Commission even though some parties argued that number was not specifically teed up in the *Second Recon Order/FNPRM*. In fact, a specific proposal for allowing some but not all applications from the Auction 83 window to continue to be processed was not explicitly stated in the *Second Recon Order/FNPRM*, yet the Commission clearly must have recognized this was a logical outgrowth of its proposal to go as far as dismissing all of the pending Auction 83 applications.

Similarly, the twists and turns of this proceeding clearly have left the fate of as-yet-unprocessed FM translator applications in Auction 83 "in play." The portion of the *Third R&O/FNPRM* requiring Auction 83 applicants to "voluntarily" dismiss all but 10 of any proposals they still had on file immediately became subject to reconsideration, and the Commission promptly gave public notice. See *Petitions for Reconsideration in Rulemaking Proceeding*, 73 Fed. Reg. 72733 (2008) ("*Recon. PN*"). And, in response to these petitions for reconsideration and stay requests that accompanied them, the Commission suspended the dismissal of Auction 83 proposals. *Media Bureau Suspends Dismissal of FM Translator Applications Related to Processing Cap*, 23 FCC Rcd. 5629 (MB 2008) ("*Dismissal Suspension PN*"). In doing so, the Commission announced it was "ceas[ing] dismissal of ... applications pursuant to th[e] processing cap, in order to provide an opportunity ... to fully consider" next steps with respect to translators and LPFMs, during which time it would "reinstate any translator applications dismissed." *Id.* Further, as noted, the prospect of all Auction 83 translator proposals simply being dismissed had been suggested as a prior possibility. The Commission thus preserved for itself as to pending Auction 83 proposals a full range of options -- from outright dismissal of all of them, to requiring applicants to dismiss all but ten (or some other number) of their proposals, to reinstatement of all proposals while other options for boosting LPFM opportunities are considered (as parties seeking reconsideration have suggested). Reinstating all applications and requiring dismissal of only those inconsistent with to-be-filed LPFM proposals that are given priority over translators is clearly an option lying along this spectrum.

The resolution set forth herein thus readily satisfies the "logical outgrowth" test. Indeed, "notice-and-comment requirements presume that the contours of the agency's final rule may differ from those of the rule it initially proposes," and it is "well-settled that an agency need not initiate a new ... comment period as long as the rule it ultimately adopts is a 'logical outgrowth' of the initial notice." *Crawford*, 417 F.3d at 1295. This "depends, in turn, on whether the affected party should have anticipated the agency's final course." *Id.* Here, given the fits and starts that marked the Commission's obvious struggle over how to satisfy both LPFM and FM translator interests --including its conflicted, evolving views regarding whether to give LPFM service priority over translators, and the range of alternatives for handling Auction 83 proposals,

some of which were haltingly implemented then put off – the outcome advocated here easily falls within the range of what interested parties could have anticipated from the combined effect of the *Second Recon. Order/FNPRM*, the *Third R&O/FNRPM*, the petitions for reconsideration announced in the *Recon. PN*, and the *Dismissal Suspension PN*. See *Covad v. FCC*, 450 F.3d at 548-49.